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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA,  
16 Plaintiff,  
17 v.  
18 CARLOS E. KEPKE,  
19 Defendant.

Case No. 3:21-CR-00155-JD

**CARLOS KEPKE'S REPLY IN  
SUPPORT OF MOTION *IN LIMINE* NO.  
1 TO EXCLUDE EVIDENCE RELATED  
TO ROBERT BROCKMAN'S  
ALLEGED TAX FRAUD**

1     **I. INTRODUCTION**

2                 In its opposition, the government concedes that it will not offer at trial any evidence  
 3 regarding the legality of Mr. Robert Brockman's foreign trust structure. The remaining subjects  
 4 about which the government seeks to put on evidence concern the structure of Mr. Brockman's  
 5 trust as created in 1981, Mr. Kepke's relationship with Mr. Brockman and Mr. Tamine, and Mr.  
 6 Brockman's referral of Mr. Smith to Mr. Kepke in 2000. Mr. Kepke does not dispute the discrete  
 7 points that Mr. Brockman was his client, that Mr. Kepke creates foreign trust structures and did so  
 8 for Mr. Brockman, or that Mr. Brockman referred Mr. Smith to Mr. Kepke. The other evidence  
 9 the government seeks to admit, however, should be excluded. The government fails to explain  
 10 why forty years of evidence about Mr. Kepke's work for and relationship with Mr. Brockman and  
 11 Mr. Tamine is relevant, particularly because this evidence would only theoretically be relevant if  
 12 the government established that Mr. Brockman's trust was illegal. The government's motion  
 13 should consequently be denied.

14     **II. ARGUMENT**

15                 The government concedes in its opposition that it does not intend to put in any evidence  
 16 that suggests that Mr. Brockman's foreign trust structure was illegal. The government asserts that  
 17 “[t]he legality of Brockman's foreign trust/tax shelter will not be before the jury, and the  
 18 government does not intend to raise those questions in this trial” and that the government will not  
 19 put on any evidence that would “require consideration of the legality of Brockman's foreign  
 20 trust” and will not ““put[] Brockman's trust on trial.”” (Opp'n at 8 (ECF No. 95).) The  
 21 government later adds that it “does not intend to introduce Brockman's income tax returns into  
 22 evidence or evidence that establishes that the returns are false,” and that “[t]he Brockman  
 23 Evidence will not accuse Defendant of being involved in uncharged criminal behavior or other  
 24 ‘bad acts.’” (*Id.* at 10.)

25                 Based upon these broad and unequivocal representations, the defense understands that the  
 26 government will not present any evidence that would tend to directly prove or implicitly suggest  
 27 that Mr. Brockman's trust structure was improper. By way of example, Mr. Kepke understands  
 28 that the government will not present any evidence regarding Mr. Brockman's alleged use of code

1 words, code names, encrypted email, backdating documents, avoiding the use of traceable phone  
 2 lines, and evidence destruction. (*See also* Opening Br. at 4 (ECF No. 90).) Mr. Kepke further  
 3 understands that the government will not present any evidence tending to suggest that Mr.  
 4 Brockman's trust was a sham, or used to avoid paying taxes. Mr. Kepke also understands that the  
 5 government will not present any evidence regarding the purported "securitization" of Mr.  
 6 Brockman's files. Mr. Kepke accepts these representations.

7 This leaves a narrowed set of subjects about which the government does seek to put on  
 8 evidence related to Mr. Brockman and Mr. Tamine. First, the government intends to admit  
 9 evidence to establish that Mr. Kepke "participat[ed] in the creation of Brockman's trust, the  
 10 AEBCT," contending this "constitutes circumstantial evidence of Defendant's knowledge and  
 11 professional conduct regarding similar foreign trusts." (Opp'n at 10; *see also id.* at 7, 9.) Second,  
 12 the government intends to offer evidence of Mr. Kepke's "working relationship" with Mr.  
 13 Brockman and Mr. Tamine, asserting that it is probative of "Defendant's willfulness and lack of  
 14 inadvertence or mistake." (*Id.* at 8, 10.) And third, the government plans to offer evidence that "in  
 15 2000 Brockman referred Smith to Defendant to create and manage a foreign trust/tax shelter." (*Id.*  
 16 at e.g., 7, 10.)

17 Mr. Kepke does not dispute that Mr. Brockman was his client, that Mr. Kepke created  
 18 foreign trust structures for clients, including Mr. Brockman, or that Mr. Brockman referred Mr.  
 19 Smith to Mr. Kepke to help set up a foreign trust structure. (*See also* Opening Br. at 6 (stating that  
 20 "Mr. Kepke does not generally contest the admission of evidence related to Mr. Brockman that  
 21 provides necessary context for evidence that is directly relevant to the charges").) Mr. Kepke  
 22 remains concerned that a witness may be asked about these limited subjects and begin discussing  
 23 Mr. Brockman's alleged tax fraud or efforts at avoiding government detection. In order to avoid  
 24 this risk that a witness would open the door to reversible error, and in the interest of reaching  
 25 agreement where possible, Mr. Kepke is open to the possibility of stipulations on these limited  
 26 issues, along the lines articulated above.

27 Evidence beyond these three limited points has no relevance. The government argues that  
 28 the evidence it seeks to admit is relevant to willfulness, knowledge, and lack of inadvertence and

1 mistake. (Opp'n at 5–6, 8, 9–10.) But the government never explains how the evidence proves  
 2 these points, nor could it given its unequivocal representations that it does not seek to suggest that  
 3 the Brockman trust was part of an illegal tax fraud. It is the government's burden to demonstrate  
 4 that the proposed evidence tends to prove a material point, *United States v. Bailey*, 696 F.3d 794,  
 5 799 (9th Cir. 2012), which in turn requires the government to “articulate precisely the evidential  
 6 hypothesis by which a fact of consequence may be inferred from the other acts evidence.” *United*  
 7 *States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982). The government has failed to carry its  
 8 burden.

9       As to willfulness, evidence of Mr. Brockman's trust cannot illuminate whether Mr. Kepke  
 10 violated a known legal duty unless the government establishes that Mr. Brockman's trust was  
 11 illegal. *See Cheek v. United States*, 498 U.S. 192, 201–02 (1991) (“Willfulness . . . requires the  
 12 Government to prove that the law imposed a duty on the defendant, that the defendant knew of  
 13 this duty, and that he voluntarily and intentionally violated that duty.”). Again, the government  
 14 has unequivocally said that it will not seek to establish the illegality of Mr. Brockman's trust  
 15 structure. As a result, this evidence has no relevance to willfulness, knowledge, or lack of  
 16 inadvertence and mistake. In any event, this is not a case involving a taxpayer's failure to file  
 17 taxes or a tax preparer's filing of false returns, where inadvertence or mistake or lack of  
 18 knowledge might be defenses. (Opp'n at 6, 9 (citing only cases involving failure to file taxes or  
 19 filing of false tax returns).)

20       The government places a lot of emphasis on the undercover materials it has separately  
 21 moved to admit, suggesting that the proposed evidence should be admitted because it would help  
 22 provide context and corroboration for the undercover recordings. (Opp'n at 3–4, 7, 10.) But the  
 23 recordings are not admissible, so the proposed evidence is unnecessary for this purpose. (*See*  
 24 Carlos Kepke's Opp'n to Mot. to Admit Evidence of Undercover Contacts (ECF No. 72).) In fact,  
 25 the government's opposition brief emphasizes why its motion to admit the undercover recordings  
 26 should be denied. First, undercover statements regarding Mr. Brockman and Mr. Tamine have no  
 27 relevance given the fact that the government concedes it will not establish the illegality of Mr.  
 28 Brockman's trust. And second, the government's position that a second set of extrinsic evidence

1 is necessary to provide context for the first set of extrinsic evidence shows the undercover  
 2 recordings would add even more unnecessary time to the trial.

3 In sum, because the government concedes that it will not put on any evidence that directly  
 4 proves or indirectly suggests that Mr. Brockman's trust was illegal or improper, and because Mr.  
 5 Kepke accepts that three discrete points are relevant, the remaining dispute is rather narrow. This  
 6 disputed evidence should be excluded because the government seeks to admit 40 years of remote  
 7 extrinsic evidence even though the evidence does not establish any material points, especially in  
 8 light of the government's clear commitment that it will not put on any evidence that Mr.  
 9 Brockman's trust was illegal or Mr. Kepke engaged in other "bad acts."

10 **III. CONCLUSION**

11 For the foregoing reasons, the government should be precluded from introducing evidence  
 12 related to Mr. Brockman's foreign trust other than the fact that Mr. Brockman was Mr. Kepke's  
 13 client, that Mr. Kepke created foreign trust structures for clients, including Mr. Brockman, and  
 14 that Mr. Brockman referred Mr. Smith to Mr. Kepke to help set up a foreign trust structure.

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17 Respectfully submitted,

18 Dated: October 11, 2022

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1                   CERTIFICATE OF SERVICE

2                   I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the  
3 United States District Court for the Northern District of California by using the CM/ECF system  
4 on **October 11, 2022**. I further certify that all participants in the case are registered CM/ ECF users  
5 and that service will be accomplished by the CM/ECF system.

6                   I certify under penalty of perjury that the foregoing is true and correct. Executed on **October**  
7 **11, 2022** in Los Altos, California.

8                   */s/ Grant P. Fondo*

9                   GRANT P. FONDO

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